

OPINION AND ORDER

Appellant was removed from his position as a Printing Plant Worker, Signature Press Operator, effective December 13, 1979, by the U.S. Government Printing Office. The decision of the Board's Washington Field Office dated February 11, 1980, sustained the charges against the appellant, but found they did not constitute sufficient grounds to warrant the penalty of removal.

The agency filed a timely petition for review resting its argument primarily on the grounds that the presiding official's decision should be reversed as improper, since the presiding official determined (1) that the agency has the burden of proving that the sustained charges warrant the action taken by the agency and (2) the agency has not met that burden. The Office of Personnel Management intervened to contend, *inter alia*, that the agency does not have a burden to show that the penalty is supported by a preponderance of the evidence and that when a presiding official concludes that an agency has abused its discretion with regard to imposition of a penalty, the case should be remanded to the agency for further disposition. The Board's authority in connection with matters relating to penalty was recently set forth in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

The facts as set forth in the charges are not in dispute. It is established in the record that appellant, as alleged, failed to carry out instructions of his supervisor. To wit, on July 24, 1979, appellant and another employee were assigned to folding machine 136. Appellant's designated lunch period was from 12:30 to 1:00 p.m. At approximately 11:30 a.m. appellant was instructed by his group chief to delay his regularly scheduled lunch break in order to complete the "hot Congressional job" he was working on. However, appellant went to lunch at his regular time anyway. This in turn caused a delay in production, in that another employee had to be removed from a cutting machine to take appellant's place while he was at lunch. Also considered by the agency in determining to remove appellant was a past disciplinary action record involving a two-day suspension from duty. In that incident, appellant was presented with his performance evaluation to sign. Upon reading it, appellant tore it up and left the room. (These incidents occurred approximately four months apart).

The scope of the Board's review of an agency's selection of a penalty was discussed in *Douglas, supra*, 333. After noting that a penalty should be selected only after the relevant factors have been weighed, the Board

held that the purpose of its review is to assure that the agency conscientiously considered the relevant factors and in choosing the penalty, struck a responsible balance within the limits of reasonableness.

For the reasons set forth below, the Board cannot conclude that the action of the agency in determining to impose some penalty in this case was wholly unreasonable. However, in the Board's judgment, the penalty of removal was too severe, and excessively inappropriate to the charges.

The most important factor in the Board's decision is the nature and seriousness of the offense. While we cannot characterize the offense as warranting the imposition of the most stringent penalty of removal, since only a 30-minute delay in the work schedule occurred, we find some penalty appropriate in light of the fact that appellant did disobey his supervisor's instructions. In addition, we note that appellant has a past disciplinary record of a two-day suspension imposed when he tore up his performance evaluation. However, it appears that appellant has worked for the agency for over 10 years and, with the exception of the two-day suspension, has had a hitherto unblemished work record. Also, we note appellant's numerous apologies in the record, his recognition of the seriousness of his offense and its consequences and his pleas that he will be a model employee in the future. We think these assertions augur well both for appellant's "rehabilitation" and for the possibility of deterrence to any further misconduct in the future.

Thus, although appellant did disregard his supervisor's instructions, there were, as set forth above, mitigating circumstances. Consequently, the Board finds that a suspension for 30 days in lieu of removal is a more appropriate penalty in this case and would more effectively promote the efficiency of the service. (See 5 U.S.C. § 7513(a)).

Accordingly, the initial decision is AFFIRMED as modified by this Opinion and Order. The U.S. Government Printing Office is hereby ORDERED to cancel the removal action and within ten days of the date hereof, the agency shall file with the Board's Washington, D.C. Regional Office written verification of its compliance with this Opinion and Order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in an appropriate court no later than (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR.
Secretary,

July 17, 1981